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No. 85-899

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

WILLIAM BARRETT,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Is the Fifth Amendment privilege against self-incrimination abridged when a defendant, although reluctant to sign a written statement in the absence of counsel, nevertheless gives a knowing and voluntary oral statement to investigating officers?

LIST OF ALL PARTIES

The sole petitioner is the State of Connecticut. The sole respondent is William Barrett.

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BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 197 Conn. 50, 495 A.2d 1044 (1985), and is reprinted in Appendix A to the Petition, pages 1A-12A. This Court's grant of certiorari is reported at 106 S.Ct. 1967 (1986).

JURISDICTION

The Connecticut Supreme Court announced its decision on July 30, 1985. The State of Connecticut filed its motion to reargue on August 9, 1985, which motion was denied on September 24, 1985. The Petition for Writ of Certiorari was timely filed on November 22, 1985 and was granted by this Court on May 19, 1986. This Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [Nor] shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In New Haven, Connecticut on the evening of October 23, 1980, the victim, M.J., was waiting for a bus.[1] While waiting, she was offered a ride by Robert Artis and the Respondent, William Barrett, both of whom she had known for approximately eight years. M.J. accepted Barrett's offer.

Rather than drive M.J. to her destination, Barrett and Artis drove to a secluded area in Wallingford, Connecticut. There M.J. was repeatedly sexually assaulted by both men. During this attack, M.J. sustained, *inter alia*, facial and wrist injuries.[2] She did manage to scratch Barrett.[3] M.J. also was successful in hiding diverse evidence of the sexual assault in the rear seat of Barrett's vehicle.[4]

Upon returning to New Haven, the victim immediately advised family and police officials of the assault, naming both assailants.[5] Barrett and Artis were taken into custody later that evening by the New Haven Police Department. Upon apprehension, Barrett attempted to conceal his identity.[6] At that juncture, the arresting officers advised Barrett of his *Miranda* rights.[7]

Because the sexual assault occurred in Wallingford, personnel from that town transported Barrett and Artis to the Wallingford Police Station. The suspects arrived at the police

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[1] Unless otherwise noted, the statement of the case derives from the opinion of the Connecticut Supreme Court.

[2] Trial transcript (Tr.) at 9.

[3] Tr. at 14.

[4] Tr. at 25-26. This evidence included her undergarments, loosened car upholstery buttons and M.J.'s initials scratched in the car seat.

[5] Tr. at 261.

[6] Tr. at 231.

[7] Tr. at 234, 255, 298.

station's processing room at approximately 5:30 a.m. There, Officer Peter Cameron read Barrett the *Miranda* rights from a standard acknowledgement form. Barrett signed and dated that form.[8] Barrett then made several telephone calls; the officers did not know either the purpose or the recipients of those calls.[9]

Cameron and Officer John Genovese led Barrett to a police interrogation room where Genovese read Barrett the *Miranda* rights for a third time. Barrett once again signed and dated an Acknowledgement of Rights form.[10] Cameron then asked Barrett "if he would like to make any kind of statement to the police regarding the incident with which he was charged."[11] Barrett responded that "[h]e would give no written statement to the police; nothing in writing; however, he would be more than happy to talk about it. He had no problem with that."[12] The interrogating officers testified that Barrett's subsequent narrative statement appeared to be voluntary.[13]

Barrett proceeded to tell the officers his account of the encounter with M.J. His statement was in the nature of a narrative, punctuated with occasional questions from Cameron and Genovese aimed at clarifying certain details. Barrett answered some of these questions; he ignored others.[14]

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[8] Joint Appendix (J.A.) at 6A–8A, 9A.

[9] J.A. at 21A, 98A.

[10] J.A. at 6A, 9A, 30A, 31A.

[11] J.A. at 9A, 21A.

[12] *Id.* During cross-examination, Officer Cameron testified that Barrett wanted to consult with counsel before signing a written statement.

[13] J.A. at 26A.

[14] J.A. at 24A.

Later that morning, Lieutenant Murt Howard once again advised Barrett of the *Miranda* rights; Barrett responded orally that he understood them.[15] Asked by Howard whether he would give police a written statement about his version of the encounter with victim, Barrett replied that "he was willing to talk about it verbally but he did not want to put anything in writing until his attorney came."[16] A second narrative proceeded much like the first, with Barrett controlling the scope of the interview.[17]

At a pre-trial suppression hearing Barrett contended he had neither comprehended nor relinquished his *Miranda* rights.[18] He did not claim that he had requested counsel for his oral statement. At the conclusion of the suppression hearing, the trial court ruled that Barrett's actions were evidence Barrett totally comprehended the import of his rights and had voluntarily waived them. It therefore denied Barrett's Motion to Suppress and permitted the prosecution's use of Barrett's oral statements.

The Respondent did not testify at the suppression hearing.[19]

On appeal Barrett raised for the first time the argument that he had invoked his right to counsel prior to the police

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[15] J.A. at 31A-32A, 39A, 48A-49A.

[16] J.A. at 44A.

[17] J.A. at 56A.

[18] Tr. at 590.

[19] The Respondent did testify at trial, offering basically the same exculpatory version of events as he had related to the investigating officers. He further volunteered that he never attempted to contact an attorney prior to his interrogation. Instead he called his mother. (J.A. at 117A, 128A) The Respondent denied testimony that he was unwilling to make a written statement; he testified that the officers never requested any written statement. (Tr. at 858, 889, J.A. at 119A, 124A, 137A) Although the Respondent at trial complained of medical impairment during his interrogation, he admitted that he received and understood his rights. (J.A. at 125A, 130A)

interrogation. He argued on appeal that his oral statements were therefore involuntary. The Connecticut Supreme Court found the admission of the statements was error, holding:

> The defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police. *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197, reh. denied, 444 U.S. 887, 100 S.Ct. 186, 62 L.Ed.2d 121 (1979). Such a request continues to be constitutionally effective despite the defendant's willingness to make oral statements. We conclude, therefore, that the defendant did invoke his right to counsel under the Fifth and Fourteenth Amendments.

Petition at 8A.

On May 19, 1986, this Court granted the State of Connecticut's petition for a writ of certiorari to consider whether a criminal suspect's reply to police that he is willing to discuss orally the matter under investigation, but that he will not give a written statement without having an attorney present, makes unconstitutional the use of any oral statement thereafter given.

SUMMARY OF ARGUMENT

In *State v. Barrett*, 197 Conn. 50, 495 A.2d 1044 (1985), the Connecticut Supreme Court applied a rigid rule which required all questioning to cease upon a suspect's mention of the word "attorney." This inflexible rule miscontrues the holdings of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477, *reh. denied*, 452 U.S. 973 (1981), ascribing a talismatic quality to the word "attorney" in a situation where a suspect's oral statement is clearly voluntary.

The Respondent, faced with a choice of options, elected to speak with police and defer legal representation. This choice should not be construed as an assertion of the right to counsel at oral interrogation. It was simply a selective waiver of representation.

Through its arbitrary analysis of the facts presented, the Connecticut Supreme Court adopted a paternalistic approach to criminal interrogation. The decision ignores the balance created by *Miranda* and *Edwards* between the interests of law enforcement and the right of an individual to be free from coerced self-incrimination.

ARGUMENT

THE RESPONDENT NEVER ARTICULATED A DESIRE FOR COUNSEL AT HIS INTERROGATION. CONSEQUENTLY, INVESTIGATING OFFICERS PROPERLY ALLOWED THE RESPONDENT TO NARRATE HIS VERSION OF THE EVENTS AT ISSUE

A. Barrett's Oral Statements Were Voluntary

At the Wallingford Police Station Barrett, fully cognizant of his constitutional rights, determined that it was in his best interests to waive those rights for a limited purpose. Consequently, he gave an oral narrative of the events in question. The oral statement was unconditional. Barrett did, however, refuse to give a written statement without an attorney present.

In ruling on the question presented below, the Connecticut Supreme Court applied a rigid rule which required all questioning to cease upon a suspect's mention of the word "attorney." Relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477, *reh. denied*, 452 U.S. 973 (1981),[20] the Connecticut Supreme Court concluded that Barrett's refusal to reduce his oral statement to writing without the assistance of counsel was a "request for counsel" under *Edwards* which mandated exclusion of all oral statements. This conclusion misconstrues the holdings of *Miranda* and *Edwards*, and the policies underlying them, by ascribing an unwarranted talismatic quality to the use of the word "attorney" by a suspect who is subsequently interrogated.

This Court has held repeatedly that the test for determination of a valid waiver for the Fifth Amendment right is not

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[20] The Connecticut Supreme Court specifically disavowed any reliance on state law. 197 Conn. at 54 n.3.

mechanical, but requires an examination of the totality of circumstances in each particular case. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). This Court has never isolated a defendant from his own intelligent and voluntary decisions about a criminal case. *Faretta v. California*, 422 U.S. 806, 835 (1975); *Michigan v. Mosley*, 423 U.S. 96, 109 (1975). Rather, the Court has set certain standards by which a trial court can measure the validity of a waiver of the Fifth Amendment privilege against self-incrimination. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The test for voluntariness is not whether there has been literal compliance with the procedure set forth in *Miranda; see Michigan v. Tucker*, 417 U.S. 433, 444 (1974); but whether the waiver of rights was made "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 106 S.Ct. 1135, 1141 (1986). *See also North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979). The issue before the trial court was whether Barrett's free choice was substantially impaired. Despite the Connecticut Supreme Court's obfuscation of issues, the same question is presented to this Court.

B. The Respondent's Limited Invocation Of Rights Was Scrupulously Honored

In the present case William Barrett was an educated, intelligent individual capable of articulating a desire for immediate representation. He chose not to assert this right. Instead, Barrett deferred invocation of his right to legal representation until such time as the Wallingford police investigators attempted to obtain a written statement. The Petitioner recognizes that something short of a formal or direct request for counsel might be construed as an assertion of the right to counsel. However, in the present case Barrett never articulated a request for counsel during interrogation. Consequently, his statements were admissible.

Barrett, faced with a choice of options, elected to speak with the police and defer representation. This was his right.

Having stated without the slightest hesitancy that he would answer questions, Barrett in no way invoked his right to counsel for that oral interrogation. *See, e.g., Bradburn v. McCotter,* 786 F.2d 627 (5th Cir. 1986); *United States v. Eirin,* 778 F.2d 722 (11th Cir. 1985); *United States v. Jardina,* 747 F.2d 945 (5th Cir. 1984). Instead, he selectively waived his right to representation, choosing to limit that protection to the execution of a legal document. This type of selective representation has been recognized by this Court. *Wyrick v. Fields,* 459 U.S. 42, 47 (1982).

In *Wyrick v. Fields,* the defendant, who was represented by counsel, agreed to waive the presence of his attorney during a polygraph test. At the conclusion of the test, the examiner told Fields that the polygraph indicated some deceit and suggested Fields explain his answers. Fields then made several incriminatory statements.

This Court recognized the validity of Field's limited waiver of representation, holding:

> Fields waived not only his right to be free of contact with the authorities in the absence of an attorney, but also his right to be free of interrogation about the crime of which he was suspected. Fields validly waived his right to have counsel present at "post-test" questioning, unless the circumstances changed so seriously that his answers no longer were voluntary, or unless he no longer was making a "knowing and intelligent relinquishment or abandonment" of his rights. 451 U.S. at 482.

459 at 47. This Court concluded that any expansion of the rule in *Edward v. Arizona* was an unreasonable interference with police interrogation. *Id.* at 49.

C. The Rule Enunciated By The Connecticut Supreme Court Alters The Balance Inherent In *Miranda*

The purpose of *Miranda v. Arizona* is to "assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." *Miranda*, 384 U.S. at 469. The requisite warnings gave individuals the opportunity knowingly and intelligently to waive certain rights; *Id.* at 479. Rather than imprison a suspect in his privileges; *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942); *Miranda* provides suspects with the freedom necessary to make an informed choice, depending upon their own perceptions of their best interests.

The right to counsel enunciated in *Miranda* is extremely narrow. This Court has never required counsel's attendance at custodial interrogation. Instead *Miranda* merely confers upon a defendant a "right to counsel," but only when such counsel is requested during custodial interrogation. *Michigan v. Jackson*, 106 S.Ct. 1404, 1407 (1986). *See also Moran v. Burbine*, 106 S.Ct. 1135, 1142 n.1 (1986).

Similarly, the protection of the right to counsel provided by the *Edwards* decision is applicable only to situations where "an accused, . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation . . ." *Edwards*, 451 U.S. at 484–85. *See also Smith v. Illinois*, 105 S.Ct. 490, 492 (1984) (per curiam).

In the present case, Barrett told police that he would not give them a written statement without an attorney present, but he had no problem in talking about the matter in question. The record contains no indication, and the court below nowhere suggests, that Barrett was laboring under the impression that oral statements were any less admissible in criminal proceedings than written statements. Indeed, prior to the first interview with the Wallingford police, Barrett had been advised of his *Miranda* rights on three separate

occasions. At least twice, he had acknowledged that he understood those rights and had signed a printed form that set them forth. Among the rights that were read to and acknowledged by Barrett was the right to remain silent with the concomitant warning that if he talked to the police officer, anything he said could and would be used against him in court. Also among those rights were the rights to consult with a lawyer and the right to have counsel with him during questioning, and the right to have a lawyer appointed before any questions. At trial, Barrett admitted comprehension of those rights. He chose in clear terms to waive those rights.[21]

The trial court concluded that Barrett comprehended his Fifth Amendment privilege against self-incrimination. He was advised on at least three separate occasions of his Miranda rights; Barrett testified he understood those rights as read. Through its arbitrary analysis of the facts presented, the Connecticut Supreme Court concluded that painstaking compliance with *Miranda* is never enough. In an overly paternalistic approach to criminal interrogation, that court concluded that a voluntary, intelligent, rational decision to speak in the absence of counsel could be negated by a suspect's mere mention of the word "attorney" at any point and in any context. The Petitioner submits that this result destroys the existing balance created by *Miranda* and *Edwards* between the

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[21] In its opinion, the Connecticut Supreme Court stated that the trial court "impliedly found that the defendant had requested counsel." In a footnote accompanying that statement, the Connecticut Supreme Court stated that "[t]he trial court noted the defendant's refusal to give a written statement without an attorney during its discussion of the defendant's waiver of his rights." Petition at 7A. Hence, the "implied finding" ascribed to the trial court is nothing more than the trial court's acknowledgement that Barrett refused to give a written statement without an attorney. In fact, the issue of whether Barrett invoked his right to counsel was never before the trial court; rather, Barrett's claim that he invoked his right to counsel during his discussions with police was first made only on appeal to the Connecticut Supreme Court. *State v. Barrett*, 197 Conn. 50 (1985). Indeed, Barrett testified at trial testimony that the police never asked him to make a written statement. See footnote 19, *supra*.

interests of law enforcement agents and the right of an individual to be free from coerced self-incrimination.

The *Miranda* decision arose in the context of an incommunicado interrogation at which full warnings of available constitutional protections were not given. *Miranda v. Arizona*, *supra*, 384 U.S. at 445. This Court was troubled in *Miranda* by "intimidation," "unfamiliar atmosphere" and "menacing police interrogation." *Id.* at 457. The Court refused however to rule that self-incriminating statements made in the absence of counsel are always inadmissible, choosing instead to balance the competing societal and individual interests.

> Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Admissions of guilt are more than merely "desirable;" *United States v. Washington*, 431 U.S. at 186; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *New York v. Quarles*, 467 U.S. at _____. *Miranda* attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation.

Moran v. Burbine, 106 S.Ct. at 1144.

Nothing presented in this case warrants a realignment of the delicate balance struck by the *Miranda* Court. When a defendant has given a voluntary, knowing, intelligent waiver of his right to counsel at interrogation, police are not required

to supply advice designed to help a suspect better evaluate his or her self-interests. *United States v. Washington*, 431 U.S. 181, 188 (1977). Officers are not required either to provide a legal interpretation of the language of *Miranda* or to supply suspects with a constant flow of potentially relevant information. *Moran v. Burbine*, 106 S.Ct. at 1141–42. *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (en banc). Nor is error-free interrogation the relevant criterion. *See Oregon v. Elstad*, 470 U.S. _____, 105 S.Ct. 1285, 1293 (1985); *Michigan v. Tucker*, 417 U.S. 436, 446 (1974). The relevant inquiry remains whether under the totality of circumstances the suspect's free will was overborne. The trial court found no such compulsion and the record reflects none.

The fact that Barrett in spite of repeated *Miranda* warnings might have believed oral statements to be less damaging than written statements does not render his voluntary statement inadmissible. There is ample authority for the proposition that refusal to sign a written form does not preclude a finding of waiver. *See North Carolina v. Butler*, 441 U.S. 369, 375 n.5 (1979).[22]

Respondent's mention of his desire for counsel was neither contradictory nor equivocal. A statement is contradictory only if it is internally inconsistent. *Nash v. Estelle*, 597 F.2d 513, 523 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979). It would be equivocal only if a suspect expresses a dual desire to simultaneously have counsel and to continue interrogation without counsel. *Id.*

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[22] *Harris v. Riddle* 551 F.2d 936 (4th Cir.), *cert. denied*, 434 U.S. 849 (1977); *United States v. Gardner*, 516 F.2d 334 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975); *See also United States v. Cooper*, 449 F.2d 1060 (D.C. Cir. 1974); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973) (*en banc*); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); *United States v. Stevens*, 445 F.2d 304 (6th Cir.) (per curiam), *cert. denied*, 404 U.S. 945 (1971); *United States v. McNeil*, 433 F.2d 1109 (D.C. Cir. 1969); *Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970); *Klinger v. United States*, 409 F.2d 299 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969).

By unduly expanding *Miranda* and *Edwards,* the Connecticut Supreme Court has created an inflexible rule that would exclude all statements of a defendant if the word attorney is mentioned, even where the defendant's willingness to speak in the absence of counsel is clearly, intelligently and voluntarily stated.[23] *Miranda* and *Edwards* shield an individual only from the compulsion induced by a police-dominated atmosphere; they do not prevent him from placing conditions on his conversations with police or allow him to rescind a voluntary and intelligent waiver once interrogation is completed. The defendant willingly agreed to give an oral statement to police, and that statement is admissible. The statement was therefore admissible.

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[23] The trial court found Barrett's statements were voluntary. This finding was not questioned by the Connecticut Supreme Court. Consequently, the voluntariness of these statements is not an issue before this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of the State of Connecticut.

Respectfully submitted,

Petitioner
STATE OF CONNECTICUT

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